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PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~700~~ 56

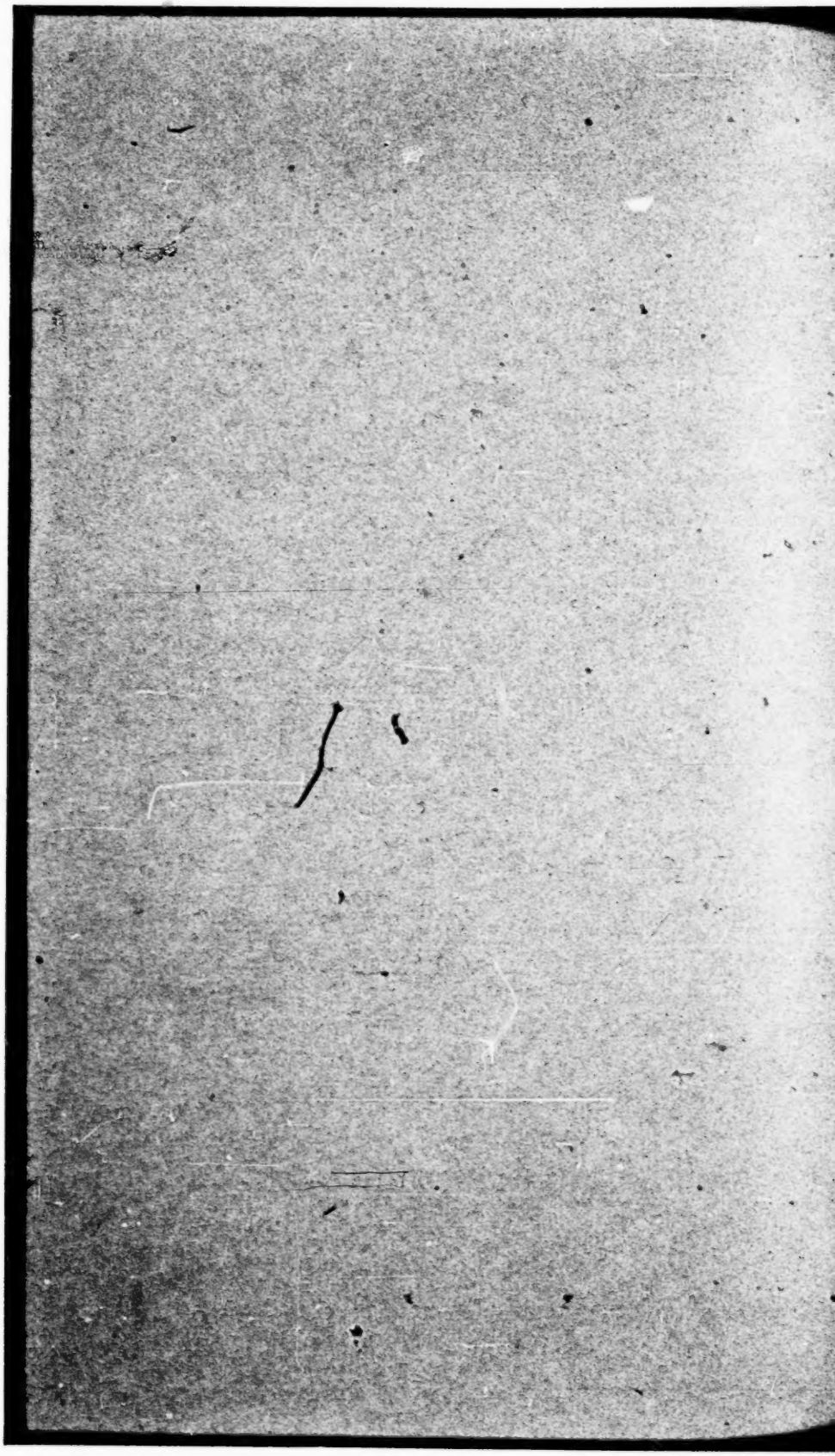
THE UNITED STATES, PETITIONER

vs.

SWIFT AND COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED FEBRUARY 28, 1930
CERTIORARI GRANTED MARCH 17, 1930



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 700

THE UNITED STATES, PETITIONER

vs.

SWIFT AND COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In Supreme Court of the United States

October term, 1929. No. 700

THE UNITED STATES, PETITIONER, v. SWIFT AND COMPANY

Petition for a writ of certiorari to the Court of Claims

The Attorney General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case in favor of the respondent for $498,961.29 on May 6, 1929. On July 5, 1929, the United States filed a motion for a new trial which was denied on December 2, 1929.

STATEMENT

This is a suit to recover income and profits taxes assessed against the respondent for the taxable year 1917 and collected from it by means of the application against the assessment of a credit for an overpayment of income and profits taxes for the taxable year 1918.

It is admitted that the respondent should recover the sum sued for, $498,961.29, provided its claim for refund of the tax involved was filed within the time required by law; that is, within four years from the date of the payment of the tax. Inasmuch as payment of the 1917 tax was effected by a credit, the case turns on the date of the allowance of the credit.

2 The case was tried on a stipulation of facts from which the Court of Claims made special findings substantially as follows:

On February 28, 1923, within the statutory period of limitation, the respondent filed a claim for refund of income and excess-profits taxes for the year 1917 in the sum of $844,695.54. (Finding VII, Ex. A.) In this claim it was contended inter alia that a dividend of $2,068,000 received from the Compania Swift de Montevideo, a foreign corporation, should be taxed at 1916 rates instead of at 1917 rates. (Finding VIII.) This claim was rejected on April 24, 1926. (Finding VIII.)

On September 3, 1927, the respondent filed what was described as an amended claim for the refund of income and excess-profits taxes for 1917 in the sum of $498,961.29 based upon the contention that the dividends of $2,068,000 received from the Compania Swift de Montevideo were stock dividends and not taxable. (Finding IX, Ex. B.) The latter claim has not been acted upon by the commissioner. (Finding XV.)

The amount sought to be recovered in the latter claim and in this suit was paid in 1923 through the application of the credit of an overpayment of 1918 tax. (Findings X, XI, XVI.) On February 9, 1923, the commissioner, in accordance with the proce-

dure then in effect, signed and forwarded to the collector of internal revenue at Chicago a schedule of reductions of tax liability, Form 7777, in which was included an overassessment of income and profits taxes for the year 1918 against the respondent in the sum of $10,304,753.94 and at the same time forwarded to the collector undated certificates of overassessment addressed to the respective taxpayers named in the schedule. (Findings XI, XII.) The certificate of the commissioner on Form 7777 directed the collector to check the accounts of the taxpayers whose names appeared on
3 the schedule to determine whether or not their liabilities should be reduced by abatements, and if so, to make such abatements. With reference to refunds and credits he directed the collector as follows (Finding XI):

"If any part of the tax is found to be an overpayment, you will examine all accounts of the taxpayer for subsequent periods and apply such overpayment as a credit against the tax owing (if any) on the taxpayer's account for subsequent periods. (This applies to income, war profits, and excess profits taxes only.)

"The balance (if any) of the overpayment shall be entered in column 12 and placed upon a schedule of refunds (Form 7777A) and an appropriate memorandum made upon the taxpayer's account."

Before the collector returned the schedule to the commissioner Form 7805A, a schedule of refunds and credits, was in use in place of the schedule of refunds, Form 7777A. (Findings XI, XIII.)

On July 25, 1923, the collector returned Form 7777 to the commissioner with Form 7805A, on which he reported that after abating a portion of the overassessment of $10,304,793.54 he had applied certain credits against taxes for other years and had applied $2,813,012.05 as a credit against an additional assessment for 1917, and that the balance remaining was refundable. (Finding XII.)

4 On September 6, 1923, Form 7805A was signed by the commissioner, the deputy commissioner having first signed it. The commissioner's certificate was directed to the disbursing clerk of the Treasury Department and authorized him to pay the refunds shown thereon and the accrued interest, if any. (Findings XI, XII.)

Under date of September 26, 1923, the certificate of overassessment addressed to the respondent was mailed to him, the certificate showing the amount of the overassessment which had been abated, credited, and refunded. (Finding XII.)

The Court of Claims held that payment of the 1917 tax occurred on September 6, 1923. This conclusion followed from holding that the allowance of the credit for the overpayment of 1918 taxes against the 1917 taxes was made when the commissioner signed the schedule of refunds and credits, Form 7805A, for transmission to the disbursing clerk. It rejected the respondent's contention that the second claim for the refund of 1917 taxes constituted an amendment of the first claim but found that the latter claim, filed September 3,

1927, was filed within four years of the time of the payment of the tax and hence within the limitation period prescribed in section 284 (b) (1) of the revenue act of 1926 (c. 27, 44 Stat. 9, 66, infra).

STATUTES INVOLVED

Revenue act of 1918 (c. 18, 40 Stat. 1057, 1083, 1085):

"SEC. 250. (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252. * * *

"SEC. 252. That if, upon examination of any return of income made pursuant to this act, the act of August 5, 1909, entitled 'An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' the act of October 3, 1913, entitled 'An act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' the revenue act
4a of 1916, as amended, or the revenue act of 1917, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer."

Revenue act of 1921 (c. 136, 42 Stat. 227, 264, 268):

SEC. 250. (b) Same as section 250 (b) of the revenue act of 1918, above quoted.

SEC. 252. Same as section 252 of the revenue act of 1918, above quoted.

Revenue act of 1926 (c. 27, 44 Stat. 9, 66):

"SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this act, the act entitled 'An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the act entitled 'An act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the revenue act of 1916, the revenue act of 1917, the revenue act of 1918, the revenue act of 1921, or the revenue act of 1924, or any such act as amended, the amount

of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

"(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

"(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior act, unless before the expiration of such period a claim therefor is filed by the taxpayer; * * *." (U. S. C. App., Title 26, sec. 1065.)

ASSIGNMENTS OF ERROR

1. The Court of Claims erred in holding that the credit of an overpayment of income and profits taxes for one year against taxes due for another year was allowed when the Commissioner of Internal Revenue signed a subsidiary schedule of refunds and credits, Form 7805A (September 6, 1923), directing the disbursing clerk of the Treasury to pay the amounts listed thereon as refundable.

2. The Court of Claims erred in not holding that such credit was allowed when the commissioner signed the certificate on the schedule of overassessments, Form 7777 (February 9, 1923), stating that he had allowed the overassessments appearing thereon and directing the collector of internal revenue to apply any overassessments found to be overpayments against any taxes due for other years.

3. The Court of Claims erred in holding that a claim for refund of the 1917 taxes involved in this suit was filed within four years after payment of the 1917 taxes was made through the allowance of a credit against them for an overpayment of 1918 taxes.

REASONS FOR GRANTING THE WRIT

The question whether a credit is allowed when the Commissioner of Internal Revenue certifies the schedule of overassessments for transmission to the collector of internal revenue or when he signs the subsidiary schedule of refunds and credits for transmission to the disbursing clerk is the same question that is involved in United States v. Boston Buick Company and United States v. Iron Cap Copper Company, now pending before this court on petition for certiorari (Nos. 632, 633). In those cases the question is material in connection with the computation of interest on credits, whereas here it arises in connection with a statute of limitations, but plainly the date of the allowance of a credit must be the same for both purposes. If petition for certiorari is granted in the Boston Buick Company and Iron Cap Copper Company cases, it is important and necessary that a writ of certiorari also issue in this case in order to

preserve the rights of the Government pending decision by this Court of the latter two cases. The arguments made in the brief in support of the petition for writs of certiorari in those cases apply equally to the instant case, and reference is made to such brief.

Wherefore it is respectfully submitted that this petition should be granted.

WILLIAM D. MITCHELL,
Attorney General.

MARCH, 1930.

6 In Court of Claims of the United States

No. J-226

SWIFT AND COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed April 21, 1928

To the honorable the CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE COURT OF CLAIMS OF THE UNITED STATES:

The plaintiff sues the defendant and for a cause of action respectfully states:

I

The plaintiff is, and at all the times in question was, a corporation organized and existing under the laws of Illinois with its principal office and place of business at the city of Chicago, in that State.

7 It has at all times borne true allegiance to the Government of the United States and has never taken part in rebellion or insurrection against it. It is the sole owner of the claim hereinafter set forth, and no assignment or transfer thereof or of any interest therein has been made.

At all the times in question it was engaged, directly, or through affiliated corporations and other business units, in the buying of cattle, sheep, and hogs, and converting these into fresh and cured meats for human consumption, and in the distribution and sale of the same; also, in the distribution and sale of poultry and eggs; in the manufacture, distribution, and sale of lard, butter cheese, oleomargarine, oleo oil, cotton seed oil, animal feeds, soap, tallow, glue, and fertilizer; in the preparation, distribution, and sale of hides, sheepskins, and wool; in the tanning, distribution, and sale of leather; and in the operation of stockyards, and refrigerator transportation lines. Its business extended to every part of the

United States, and also to Europe, South America, and other foreign parts.

II

Compania Swift de Montevideo, S. A., was at all the times in question a juridical entity, corresponding with our corporation, created, and existing under the laws of Uruguay.

III

At the close of business, December 31, 1916, the Compania
8 Swift of Montevideo had a capital of 2,000,000 pesos, gold, divided into 20,000 shares of 100 pesos each, all owned by the plaintiff; also a surplus of 20,072,724.03 pesos, gold, nearly all invested in plant extensions and other fixed assets required in the company's business.

IV

On December 31, 1916, 2,000,000 pesos of this surplus was set aside by appropriate journal and ledger entries as a "reserve for increase of capital to be effected."

V

On January 15, 1917, in compliance with a cablegram from the plaintiff advising an "increase of capital * * * by stock dividend" equal to the amount of this reserve, "no cash dividend to be declared," the directors of Compania Swift de Montevideo, passed a resolution to submit to the shareholders a proposal to capitalize 2,000,000 pesos of the company's surplus by increasing its capital from 2,000,000 pesos to 4,000,000 pesos, gold, divided into 40,000 shares of 100 pesos each, and called a shareholders' meeting for that purpose.

VI

At the shareholders' meeting, held March 24, 1917, this proposal was adopted, the resolution reciting "that the new issue of shares should be made immediately, giving preference to the present share-
holders, the subscribers to pay in the total amount as soon as
9 the Directors may deliver the shares." On March 31, 1917, the increase of capital stock was approved by the Minister of Finance of Uruguay.

VII

On April 5, 1917, by appropriate journal and ledger entries, the 2,000,000 pesos reserved out of the surplus on hand at the close of 1916 for the anticipated increase of capital was transferred on the books of the company to the capital account, and on or about April 21, 1917, certificates representing the new shares of capital stock were

duly issued, signed by the president, the secretary, and a member of the board of directors, and with the required stamps attached.

VIII

On June 25, 1917, the shareholders' annual meeting was held, and the minutes recite that "the meeting decided to distribute a dividend of 100 per cent," i. e., 2,000,000 pesos (being the amount of the new shares of capital stock) out of the surplus of 2,072,724.03 pesos on hand at the close of 1916, without expressly stating whether it was to be payable in cash or in the new shares.

All but a very small amount of the surplus out of which this dividend was declared was, as aforesaid, in the form of fixed assets required in the company's business, and consequently did not admit of a dividend payable in cash. Besides, as just stated, 2,000,000 pesos of this surplus had already been transferred to the
10 company's capital account and new shares of capital stock issued against it, and therefore was no longer surplus at all at the time of the declaration of the dividend. No payment on account of the dividend was in fact made in cash or by check at any time.

IX

Subsequently the certificates representing the 2,000,000 pesos of new shares were delivered to the plaintiff as sole shareholder and were entered on the books of the plaintiff in the result account of the Compania Swift de Montevideo as a stock dividend, the entry reading "1917, Sep. 29, stk. div. J90, [$]2,068,000."

X

This stock dividend of 2,000,000 pesos, equal to $2,068,000, was erroneously included as income in the plaintiff's return of net income for the taxable year 1917, by reason whereof the income and war excess-profits taxes assessed against and collected from the plaintiff for that year exceeded the amount lawfully owing by $498,961.29.

XI

On February 28, 1923, which was within five years from the date when its return for 1917 was due, the plaintiff filed a claim for refund of income and war excess-profits taxes paid for that year on the ground amongst others of "Foreign dividends overstated." A copy thereof is annexed as Exhibit A.

11–12 On September 3, 1917, which was within four years from the date of collection from it of $2,813,021.05 of income and war excess-profits taxes for 1917, the plaintiff filed an amendment of this claim setting up as a specific ground for refund that the beforementioned item of $2,068,000 included as income in its return for 1917

was not income but a stock dividend and therefore not taxable. A copy thereof is annexed as Exhibit B.

XII

No decision on the claim as amended has been rendered by the Commissioner of Internal Revenue, nor has any portion of the aforesaid overassessment been refunded or credited to the plaintiff.

XIII

Wherefore the plaintiff prays judgment against the United States for $498,961.29, with interest as provided by law.

SWIFT AND COMPANY,
By G. CARROLL TODD,
Attorney for Plaintiff,
1001 15th Street NW., Washington, D. C.

[*Duly sworn to by G. Carroll Todd; jurat omitted in printing.*]

13 *Exhibit A to petition*

507143

[Treasury Department, Internal Revenue Service. Form 843—Jan., 1922. Comptroller General U. S. January 18, 1922]

[3800. IMPORTANT: File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in]

Inventoried 3-17-24

CLAIM FOR

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☒ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

NOTICE TO COLLECTOR: Collector must indicate in block above the kind of claim, except in income-tax cases.

Collector's notation: Date received, Feb. 28. Date received by Administrative Unit, Mar. 31, 1923. Claims Control Section.

STATE OF ILLINOIS,
County of Cook, ss:

Swift & Company (Illinois) and affiliated companies.
Union Stock Yards, Chicago Ill.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named.

and that the facts given below with reference to said statement are true and complete:

	Period Year
	From: January 1, 1917
	To: December 31, 1917
1. Business is which engaged: General meat packing.	
2. Character of assessment or tax: Income and excess-profits taxes.	
3. Amount of assessment or stamps purchased	$
4. Reduction of tax liability requested (income and profits tax)	844,695.54
5. Amount to be abated	
6. Amount to be refunded (or such greater amount as is legally refundable)	844,695.54
7. Dates of payment (see collector's receipts or indorsements of canceled checks)	
(If statement covers income tax liability, items 8–11, inclusive, must be answered.)	
8. District in which return (if any) was filed: 1st Illinois.	
9. District in which unpaid assessment appears	
10. Amount of overpayment claimed as credit	
11. Unpaid assessment against which credit is asked: Period from ____ to ____	

Deponent verily believes that this application should be allowed for the following reasons:

Because of corrections in invested capital and income on account various items not heretofore under consideration between the company the Revenue Bureau, among which are the following:

Allocation of capital-stock tax.

Allocation of profits from barque "Hillstrom."

Depreciation based upon corrected values and overtime use.

Branch-house reap'r'is. erroneously charged to depreciation re retirement of bonds.

Foreign-exchange adjustments and foreign dividends overstated.

Full details in support of this claim are being filed with the Revenue Bureau in Washington in connection with the audit made by the bureau for the years 1917, 1918, and 1919.

(Signed) SWIFT & COMPANY.
W. W. SHERMAN,
Assistant Treasurer.

Sworn to and subscribed before me this 28th day of February, 1923.

DOROTHY I. OTTON,
Notary Public.

14 *Exhibit B to petition*

[Treasury Department, Internal Revenue Service. Form 843—Jan., 1922. Comptroller General, U. S. January 18, 1922]

[IMPORTANT: File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in]

Amendment of claim filed February 28, 1923

[Execute separate form for each tax period]

AMENDED CLAIM FOR

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☒ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

NOTICE TO COLLECTOR: Collector must indicate in block above the kind of claim, except in income-tax cases.

STATE OF ILLINOIS,
County of Cook, ss:

Swift & Company (a corporation of Illinois),
Union Stock Yards, Chicago, Illinois.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period	Year
From:	Jan.	1, 1917.
To:	Dec.	31, 1917.

1. Business in which engaged: General meat packing.
2. Character of assessment or tax: Income and war excess-profits tax.
3. Amount of assessment or stamps purchased ..... $.....
4. Reduction of tax liability requested (income and profits tax) .. $498,961.29
5. Amount to be abated ..... $.....
6. Amount to be refunded (or such greater amount as is legally refundable) $498,961.29
7. Dates of payment (see collector's receipts or indorsements of canceled checks) .....
   (If statement covers income-tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed: First Illinois.
9. District in which unpaid assessment appears .....
10. Amount of overpayment claimed as credit ..... $.....
11. Unpaid assessment against which credit is asked:
    Period from ..... to ..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

In deponent's return of income for 1917, upon which income and war excess-profits taxes were assessed against it and collected, there

was erroneously included a dividend received from the Compania Swift de Montevideo, S. A., Uruguay, amounting to $2,068,000.00, which was not income within the meaning of the law, but a stock dividend, and therefore not taxable.

The erroneous inclusion of the amount of this dividend in the income upon which income and war excess-profits taxes were assessed against and collected from the deponent for the year 1917 caused the amount of such taxes so assessed and collected to exceed by $498,961.29, more or less, the amount lawfully owing by deponent.

Deponent paid the income and war excess-profits taxes assessed against it for the year 1917 on different dates. One such payment, $2,813,012.05, was made on September 6, 1923.

(Signed) W. W. SHERMAN,
Assistant Treasurer.

Sworn to and subscribed before me this 31st day of August, 1927.

(Signed) F. O. CLARK,
Notary Public.

15 II. *General traverse*

Filed May 31, 1928

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

F. K. D.

III. *Argument and submission*

On April 6, 1929, this case was argued and submitted on merits by Mr. G. Carroll Todd for the plaintiff and by Mr. Fred K. Dyar for the defendant.

16 IV. *Special findings of fact, conclusion of law, and opinion of the court by Moss, J.*

Filed May 6, 1929

This case having been heard by the Court of Claims upon a stipulation of facts, signed on behalf of the plaintiff by G. Carroll Todd, and on behalf of the defendant by Assistant Attorney General Herman J. Galloway, the court on said stipulation makes the following

Special findings of fact

I

The plaintiff is, and at all times in question was, a corporation organized and existing under the laws of Illinois, with its principal office and place of business at the city of Chicago in that State.

It has at all times borne true allegiance to the Government of the United States and has never taken part in rebellion or insurrection against it. It is the sole owner of the claim hereinafter set forth, and no assignment or transfer thereof or of any interest therein has been made.

At all the times in question it was engaged in the buying of cattle, sheep, and hogs, and converting these into fresh and cured meats for human consumption, and in the distribution and sale of the same; also, in the distribution and sale of poultry and eggs; in the manufacture, distribution, and sale of lard, butter, cheese, oleomargarine, oleo oil, cottonseed oil, animal feeds, soap, tallow, glue, and fertilizer; in the preparation, distribution, and sale of hides, sheepskins, and wool; in the tanning, distribution, and sale of leather; and in the operation of stockyards and refrigerator transportation lines. Its business extended to every part of the United States, and also to Europe, South America, and other foreign parts.

II

Compania Swift de Montevideo, S. A., was at all the times in question a corporation, created and existing under the laws of Uruguay.

III

At the close of business, December 31, 1916, the Compania Swift de Montevideo had a capital of 2,000,000 pesos, gold, divided
17 into 20,000 shares of 100 pesos each, all owned by the plaintiff; also a surplus of 2,072,724.03 pesos, gold, nearly all invested in plant extensions and other fixed assets required in the company's business.

IV

By proceedings duly taken in January-April, 1917, the Compania Swift de Montevideo converted into capital 2,000,000 pesos of this surplus by means of a stock dividend; i. e., that amount was transferred from the surplus account to the capital account and 20,000 additional shares of capital stock of 100 pesos each were issued against it. The certificates representing the additional shares were delivered to the plaintiff as sole shareholder.

V

This stock dividend of 2,000,000 pesos, equal to $2,068,000, was included as income in the plaintiff's return of net income for the taxable year 1917 on which income and war excess-profits taxes were assessed and collected. Thereafter the Supreme Court of the United States decided that stock dividends are not income and therefore were not taxable under the acts of Congress imposing income and war excess-profits taxes.

VI

By reason of the erroneous inclusion of this stock dividend as income in the plaintiff's return of net income for the taxable year 1917 the amount of income and war excess-profits taxes assessed against it and collected from it for that year exceeded the amount lawfully owing by $498,961.29.

VII

On February 28, 1923, which was within the statutory period of limitations for filing claims for refund, the plaintiff filed a claim for refund of income and war excess-profits taxes paid for the year 1917. A copy thereof is annexed to the petition as Exhibit A and by reference is made a part hereof.

VIII

Under the said claim for refund filed by the plaintiff on February 28, 1923, the plaintiff contended before the Commissioner of Internal Revenue, amongst other things, that under § 1211 of the revenue act of 1917, as construed by the Circuit Court of Appeals for the Second Circuit in Douglas v. Edwards (298 Fed. 229), certain dividends received by it in 1917 from various foreign corporations, including the dividend of $2,068,000 received from the Compania Swift de Montevideo, should not, as the commissioner maintained, be included in its income for 1917, to the extent of its net earnings for that year, but that, having been specifically declared out of earnings for 1916 and prior years, and the net earnings for those years having been sufficient for the purpose, such dividends should be treated as income for those years, respectively. The decision of the Circuit Court of Appeals in Douglas v. Edwards, supra, was reversed by the Supreme Court on November 23, 1925. On April 24, 1926, the plaintiff's aforesaid contention was overruled by the Commissioner of Internal Revenue. The contention that the said dividend of $2,068,000 was a stock dividend was not made before the Commissioner of Internal Revenue under said claim for refund filed February 28, 1923.

IX

On September 3, 1927, the plaintiff filed what was described as an amended claim for refund of income and war excess profits taxes paid for the year 1917. A copy thereof is annexed to the petition as Exhibit B and by reference is made a part hereof.

X

Additional income and war excess profits taxes to the amount of $2,813,012.05 assessed against the plaintiff for the taxable year 1917 were collected by applying as a credit against them pro tanto an overpayment by the plaintiff of income and war excess-profits taxes for the taxable year 1918, as hereinafter set forth.

XI

At the time this credit was allowed the procedure in the Bureau of Internal Revenue with respect to crediting or refunding overassessments of income and war excess profits taxes was as follows:

Upon determination by the Commissioner of Internal Revenue that there had been an overassessment of such taxes for any period a certificate of overassessment was prepared addressed to the taxpayer and showing the amount of the overassessment, but it was not dated or forwarded to the taxpayer at that time. From time to time as these overassessments were determined they were listed by districts in schedules of reduction of tax liability (Form 7777, which was the form then in use), later called schedules of overassessments. Each such schedule was signed by the Commissioner of Internal Revenue and forwarded to the collector of internal revenue for the proper district with instructions reading as follows:

"The several amounts herein noted as reduction of tax liability are hereby approved and allowed.

"You will immediately check the items herein against the accounts of the several taxpayers and determine whether the several amounts in which the tax liability has been reduced should be abated in whole or in part and make such abatement as may be warranted by the condition of the taxpayer's account for the year involved.

"If any part of the tax is found to be an overpayment, you will examine all accounts of the taxpayer for subsequent periods and apply such overpayment as a credit against the tax owing (if any) on the taxpayer's account for subsequent periods. (This applies to income, war-profits and excess-profits taxes only.)

"The balance (if any) of the overpayment shall be entered in column 12 and placed upon a schedule of refunds (Form 7777A) and an appropriate memorandum made upon the taxpayer's account.

19 "You will thereupon complete and certify this schedule and Schedule 7777A and return three copies of each to the Com-

missioner of Internal Revenue at Washington, making the appropriate entries in your accounts."

(At the time here in question the schedule of refunds, Form 7777A, referred to in the last two paragraphs of these insrtuctions, had been changed to a schedule of refunds and credits, Form 7805A.)

The certificates of overassessment addressed to the taxpayers named on the schedule were forwarded to the collector at or about the same time that the schedules of reduction of tax liability (Form 7777) were forwarded.

If in any case the collector found that no part of the overassessment had been paid, the whole thereof was abated and the certificate of overassessment was filled in accordingly and dated and mailed directly to the taxpayer by the collector.

If the collector found that all taxes previously assessed had been paid and that, therefore, the overassessment was an overpayment as well, and if he found that the taxpayer owed taxes for other periods, he entered on the schedule of overassessments under the heading, "Credit (amount)," whatever amount, within the limits of the overpayment, the taxpayer owed, and under the heading, "Account to be credited," a reference to the proper assessment list. A like entry was made on the schedule of refunds and credits (Form 7805A) under the heading, "Amount credited." In addition, the collector made an appropriate entry in the accounts of the taxpayer.

The balance of the overassessment, if any, was entered by the collector on the schedule of overassessments under the heading "Net amount refundable" and on the schedule of refunds and credits under the same heading. In addition, the collector made an appropriate entry in the accounts of the taxpayer.

Thereupon the collector returned the completed schedule of overassessments and the completed schedule of refunds and credits to the Commissioner of Internal Revenue, together with the certificates of overassessment addressed to the taxpayers named on the schedule of refunds and credits. The schedule of refunds and credits was signed by the Deputy Commissioner of Internal Revenue, and then transmitted to the Commissioner of Internal Revenue, who signed it under an inscription reading as follows: "To the disbursing clerk, Treasury Department: The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore, be made in the amounts shown in column 7. Date _____."

The certificates of overassessment in the cases involving credits were held in the office of the commissioner until warrants were issued by the disbursing clerk of the Treasury Department for the actual refunds of taxes appearing on the same schedule of refunds and credits returned by the collector. Thereupon the certificates of overassessment covering refunds, and interest, if any, together with warrants for the amount thereof, and the certificates of overassess-

ment covering credits, together with warrants for the amount of interest, if any, on said credits, were dated and returned to the collector for mailing to the taxpayers.

No other communication was given by the commissioner to the taxpayer of the allowance of a credit or refund.

XII

In accordance with the procedure set forth in Finding XI above, the Commissioner of Internal Revenue, under date of February 9, 1923, signed and forwarded to the collector of internal revenue for the first district of Illinois a schedule of reductions of tax liability (Form 7777), in which was included an overassessment of income and war excess-profits taxes for 1918 against the plaintiff in the amount of $10,304,753.94, and at the same time forwarded to the collector undated certificates of overassessment addressed to the respective taxpayers named in said schedule and showing the amount of the overassessment against each. On July 25, 1923, the collector returned this schedule to the commissioner together with a schedule of refunds and credits (Form 7805A). With respect to the overassessment of $10,304,753.94 against the plaintiff, the collector's report showed an overpayment of $4,953,575.50 (the balance of the overassessment having been abated); that out of this overpayment the following amounts were entered as credits against taxes due for other periods, namely, $194,095.33, $2,813,012.05, $72,866.22, $3,158.81, $1,099,790.57, and $35,624.42; and that the balance, $735,028.10, was refundable. The item of $2,813,012.05 was the amount of an additional assessment of income and war excess-profits taxes for 1917, as shown in "List, page, and line, 1920–6/155/5–23–B," and referred to in Finding X above. At the same time that these schedules were forwarded by the collector to the commissioner the collector returned to the commissioner the certificates of overassessment in the cases of the taxpayers named on the schedule of refunds and credits, including the plaintiff.

Thereafter, under date of September 6, 1923, the schedule of refunds and credits (Form 7805A) was signed by the commissioner, the deputy commissioner having first signed it; and under date of September 26, 1923, the certificate of overassessment addressed to the plaintiff, showing the amount of the overassessment, and the portion thereof that had been abated, the portion that had been allowed as a credit, and the portion that had been allowed as a refund, was mailed to the plaintiff, and was duly received.

XIII

Treasury Forms 7777 and 7777A, schedule of reductions of tax liability and schedule of refunds, respectively, were in use by the Bureau of Internal Revenue from February, 1922, to February, 1923. Treasury Forms 7805 and 7805A, schedule of overassessments and allowance abatements, credits, refunds, and related claims, if any,

and schedule of refunds and credits, respectively, were in use by said bureau from February, 1923, to December, 1926. Treasury Form 7920, schedule of overassessments, abatements, credits, and refunds has been in use by said bureau from December, 1926, to date. In conformity with the practice existing at the time, Forms 7777 and 7805A, and none others, were used in the present case.

21 XIV

Treasury instructions relative to refunds, credits, and abatements were duly issued in Treasury Decision 3260, SOC-mimeograph, collectors' No. 2894, bureau memorandum No. 175, SOC-mimeograph, collectors' No. 2931, and SOC-mimeograph, collectors' No. 2969. Treasury Decision 3260 is published in volume 23 of the Treasury Decisions relating to internal revenue, and in Internal Revenue Cumulative Bulletin No. 5, at page 243, and may be referred to therein with the same effect as if made a part hereof. Pertinent portions of the other instructions referred to are set out in Exhibits I, J, K, and L, respectively, annexed hereto, and made a part hereof.

XV

No decision has been rendered by the Commissioner of Internal Revenue on the aforesaid claim for refund filed by the plaintiff on September 3, 1927. Nor has any portion of the aforesaid payment by the plaintiff of $498,961.29 on account of income and war excess-profits taxes for the taxable year 1917 in excess of the amount properly due (Finding VI, above) been refunded or credited to the plaintiff.

XVI

If the claim for refund filed February 28, 1923, either alone or in connection with the claim filed September 3, 1927, is sufficient in law, or if the claim filed September 3, 1927, independently of and apart from the claim filed February 28, 1923, was filed within the time required by law, there is due and owing the plaintiff on account of overpayment by it of income and war excess-profits taxes for the taxable year 1917 a refund of $498,961.29, together with interest at the rate of 6 per cent per annum from the date of the overpayment, September 6, 1923, to wit, the date on which the credit of $2,813,012.05 referred to in Finding X above, became effective.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $498,961.29, with interest at the rate of 6 per cent per annum from September 6, 1923, to date of judgment. It is therefore adjudged and ordered

that the plaintiff recover of and from the United States the sum of four hundred ninety-eight thousand, nine hundred sixty-one dollars and twenty-nine cents ($498,961.29), together with interest thereon at the rate of 6 per cent per annum from September 6, 1923, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the revenue act of May, 1928.

Opinion

Moss, Judge, delivered the opinion of the court:

This action is for the recovery by plaintiff of an admitted overpayment of its income and war-profits taxes for the taxable
22 year 1917 in the sum of $498,961.29, with interest from the date of such overpayment. Plaintiff included in its tax return for 1917 the value of stock dividends received amounting to $2,068,000. It filed a claim for refund on February 28, 1923, alleging as a ground for the refund that the stock dividends in question should have been allocated to other years than 1917, which claim was rejected. Thereafter the United States Supreme Court decided that the value of stock dividends did not constitute taxable income, and on September 3, 1927, plaintiff filed a second claim for refund, which it designated as an amended return, and sought the refund of said sum on the ground that said stock dividends did not constitute taxable income. The Commissioner of Internal Revenue determined that the latter claim was barred by the statute of limitations, and rejected same.

We are unable to agree with plaintiff's first contention that the second claim should be construed as an amendment to the first. As stated above, the sole ground relied upon in the first claim with reference to said stock dividends was that they should have been allocated to other years than 1917. It contained no suggestion that the value of said dividends did not constitute taxable income. (Feather River Lumber Co. v. United States, decided in this court May 28, 1928; Jonesboro Grocer Co. v. United States, decided December 3, 1928.)

With reference to the second claim, it is admitted that if said claim was filed within the time required by law plaintiff should recover the sum sued for, $498,961.29; and this question, in turn, depends upon the proper determination of the question as to when a credit is allowed within the meaning of the statutes on the subject.

Section 252 of the revenue act of 1921 (42 Stat. 268) provided, with reference to crediting or refunding overpayments of income, war-profits, and excess-profits taxes collected under the revenue act of 1917:

"That if, upon examination of any return of income made pursuant to this act, * * * the revenue act of 1917, or the revenue act of 1918, it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then,

notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: Provided, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *."

Section 284 (b) (1) of the revenue act of 1926 (44 Stat. 66) provided:

"No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior act, unless before the expiration of such period a claim therefor is filed by the taxpayer; * * *."

23 The payment of this tax was accomplished by the allowance of a credit against an overassessment. The claim must therefore have been filed within four years from the date on which the allowance of this credit was made. Finding XII in the agreed findings of fact sets forth the steps taken leading up to the allowance of the credit in this case.

It is the contention of the Government that the credit was allowed on February 9, 1923, when the Commissioner of Internal Revenue certified the overassessment to the collector. This contention seems to be based on the decision in the Penn Smokeless Coal Co. v. United States, in the District Court of the United States for the Western District of Pennsylvania, decided January 3, 1929. It will be noticed that the real controversy in that case was over the question as to when the credit was "taken." It was agreed between counsel, as shown by the briefs, that "a credit is allowed when the Commissioner approves the schedule of overassessments for transmission to the proper accounting officer for credit." That point was therefore not the subject of argument. We think counsel were in error in agreeing that such was the correct principle. At any rate, it should be noticed that the court itself fell into an unfortunate error in its discussion of the case. It is stated:

"In Girard Trust Company v. United States, supra (270 U. S. 163), the court, in the opinion of Mr. Chief Justice Taft, laid down a rule as follows: '*A claim for refund or credit is allowed within the meaning of the statute when the commissioner approves the schedule in whole or in part for transmission to the proper accounting officer for credit or refund.* * * *' Applying the rule laid down in Girard Trust Company v. United States to the actual procedure in the Bureau of Internal Revenue, the credit to the plaintiff was allowed when the commissioner approved the schedule of overassessments on January 13, 1926, for transmission to the collector." (Italics ours.)

The matter quoted above was not a rule laid down by Chief Justice Taft. It was a reference by the Chief Justice to a Treasury regulation and was cited only for the purpose of expressing his emphatic disapproval of the principle embodied therein, which he did in the following language:

"We can not concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the collector of internal revenue who made the collection and keeps the account with the taxpayer."

Inasmuch as the decision in the Penn Smokeless Coal Co. case is based, in a large measure, upon a palpably erroneous premise it must be considered as of questionable value as a precedent in the present case.

It should be observed that the Government made the same contention, on the point under discussion, in the Girard Trust Company case. It is true that only refunds were directly involved in the Girard Trust Company case, but the court seems to have placed credits and refunds on the same footing, so far as the date of
24 allowance is concerned. In defining what constitutes an allowance of a claim for refund or credit, the court stated:

"The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision *finally*, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section." (Italics ours.)

The Government in its brief presented that case on the theory that no difference existed between a credit and a claim for refund in the matter of the date of the allowance. It is stated in said brief:

"* * * and the date of the allowance of the claim, that is, the date of adjudication of his right to credit or refund, remains the date of the approval of the original schedule."

The schedule is nothing more nor less than a statement of credits as well as refunds found by the collector to be due the taxpayers named therein. The opinion in the Girard Trust Company case, supra, referring to the collector's report as to the amount which should be credited on taxes due for other years, and the amount to be refunded, states (p. 171): "that this is examined by the assistant commissioner and then is delivered to the commissioner, who *makes it effective by his approval*." (Our italics.)

The commissioner "is the final judge in the administrative branch of the Government to decide * * * that a refund or credit should be granted." No other administrative officer has such authority. The commissioner's decision that there has been an overassessment is one thing; the determination that there has been an overpayment is quite another. This can not be determined by the commissioner until he is informed by the collector what part, if any, of the

overassessment had been paid, and what part, if any, had been abated. In the case of Boston Buck Company v. United States, 27 Fed. (2d) 395, the question as to when a credit is allowed was directly involved. The Government contended there, as it has done in the instant case, that, notwithstanding the decision in the Girard Trust Company case, supra, the date of the allowance of a credit is the date on which the commissioner transmits to the collector a schedule of overassessments. The court held that " in view of Girard Trust Company v. United States, supra, it can be taken as settled that the transmission of the schedule of overassessments does *not* constitute an allowance of either a *credit* or a *refund*." (Our italics.) The court expressed the opinion that there might be some ground for differentiating between a refund and a credit, and suggested that the date on which the collector enters the credit on his books might be regarded as the date of the allowance of the credit. There being no necessity in that case for a more exact determination, the court concluded the whole question by stating that " it is sufficient to decide that the credit was not allowed on March 14, 1924, when the schedule of overassessments was forwarded to the collector at Boston." The suggestion of the court to the effect that the date of the entry of the credit by the collector might be considered as the date of the allowance of the credit is not sound, for the particular reason that the collector has no authority to allow either
25 refunds or credits, that authority being vested in the commissioner, and being judicial in nature, it can not be delegated to the collector.

We have reached the conclusion that the credit involved herein was allowed within the meaning of the statute when the commissioner signed the schedule of refunds and credits as reported by the collector, which was September 6, 1923, and within four years from the filing of the second claim for refund. Plaintiff is entitled to a judgment, and it is so adjudged and ordered.

SINNOT, *Judge;* GREEN, *Judge;* GRAHAM, *Judge;* and BOOTH, Chief Justice, concur.

26

V. *Judgment*

At a Court of Claims held in the city of Washington on the 6th day of May, A. D. 1929, judgment was ordered to be entered as follows:

It is adjudged and ordered that the plaintiff recover of and from the United States the sum of four hundred ninety-eight thousand, nine hundred sixty-one dollars and twenty-nine cents ($498,961.29), together with interest thereon at the rate of 6 per cent per annum from September 6, 1923, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177, of the Judicial Code, being a part of the revenue act of May, 1928.

VI. *Proceedings after entry of judgment*

On July 5, 1929, the defendant filed a motion for a new trial.

On December 2, 1929, the court entered the following order on said motion:

ORDER

It is ordered this 2d day of December, 1929, that the defendant's motion for new trial be and the same is overruled.

BY THE COURT.

27 [Clerk's certificate to foregoing transcript omitted in printing.]

[Indorsement on cover:] File No. 34,831. Court of Claims. Term No. 700. The United States, petitioner, vs. Swift and Company. Petition for writ of certiorari and exhibit thereto. Filed February 28, 1930. File No. 34,831.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

Order allowing certiorari

Filed March 17, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

103810—30

FILE COPY

Office Supreme Court, U. S.
FILED
AUG 4 1930
CHARLES ELMORE CROPLEY
CLERK

No. 56

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

v.

SWIFT AND COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MOTION TO ADVANCE